STATE OF MICHIGAN

COURT OF APPEALS

AUTO CLUB INSURANCE ASSOCIATION,

Plaintiff-Appellant,

v NO. 97637

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

Before: McDonald, P.J., and Kelly and W.F. Lavoy,* JJ.

PER CURIAM.

The question presented here is whether a health insurer can limit its liability to a nominal amount, when the insured's injury would otherwise be covered by a no-fault auto insurance policy. This question has previously been answered in the negative and we agree with that determination.

The underlying facts that give rise to this issue are not in dispute. The insured, Jacob Scheer, was injured in an automobile accident on August 21, 1984. At the time of his injury Scheer was covered by both a no-fault auto insurance policy issued by plaintiff (which contained a coordinated medical benefits provision required by MCL 500.3109a; MSA 24.13109(1)), and a health insurance policy issued by defendant.

In its complaint plaintiff contends it has paid out over $60,000 in medical expenses based on Scheer's injuries that resulted from the auto accident. Plaintiff argues that it is entitled to reimbursement from defendant for 100% of all medical expenses paid on behalf of Scheer, incurred as a result of the auto accident. Defendant answered plaintiff's complaint in part by stating that it had paid Scheer $300.

Plaintiff and defendant subsequently both moved for summary disposition on the issue of liability for the insured's medical expenses. Plaintiff relied on Federal Kemper Ins Co,

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*Circuit judge, sitting on the Court of Appeals by assignment.

Inc. v Health Ins Administration, Inc., 424 Mich 537; 383 NW2d 590 (1986), for the proposition that where there is competing excess coverage clauses, a health insurance policy would be primary and no-fault insurance PIP benefits would be secondary, in order to promote the public policy behind MCL 500.3109a; MSA 24.13109(1). Defendant countered this argument by claiming that its coverage was primary, but contractually limited to $300, where, as here, the injury is the result of an automobile accident and benefits are provided under the Michigan No-Fault Insurance Act. The trial court responded to these arguments by granting defendant's motion for summary disposition. Plaintiff appeals as of right.

In Federal Kemper, the health insurance policy and the auto no-fault insurance policy held by the insured both contained conflicting "other insurance" provisions, whereby each insurer disclaimed primary liability. MCL 500.3109a; MSA 24.13109(1) requires that no-fault auto insurers offer a coordination of benefits provision. In order to effectuate the public policy motives behind this statutory provision (of eliminating duplicative recovery, and containing or reducing auto insurance costs), in Federal Kemper, supra, the Supreme Court concluded that in instances where the party injured and eligible for PIP benefits also has health insurance, the health insurance carrier is primarily liable for payment of an insured's medical expenses that are the result of the auto accident (despite "other insurance" clauses in the health insurance policy), where the insured elected to coordinate no-fault PIP benefits with health insurance.

On appeal defendant contends that since its maximum benefit limitation does not involve a health insurer's attempt to make no-fault insurance primary in the face of a no-fault insured's election to the contrary, the letter and spirit of the Federal Kemper decision has been observed. Therefore, defendant

concludes since there is no conflict over priority and therefore no confusion as to whether the health insurer pays first, the insured gains the benefits of Section 3109a, for it is the order of priority, not the level of benefits, which secures consumer no-fault savings and safeguards the insured's choice to coordinate his no-fault benefits with existing health care coverage.

In Michigan Mutual Insurance Co v American Community Mutual Ins Co, 165 Mich App 269; 418 NW2d 455 (1987), lv den 430 Mich ___ (1988), this Court was faced with the identical problem presented here: Can a health insurer avoid the holding in Federal Kemper, by accepting "primary" liability but limiting its exposure to $300. This Court concluded:

> "Defendant's argument that it does not deny primary liability as the Federal Kemper insurers did misperceives the meaning of the word 'primary' as used in that case. While it asserts that Federal Kemper was concerned with order of priority, it is clear from that case that 'primary' was intended to mean 'principal' or 'first in importance' and did not denote 'first in time' or refer to temporal priority. Within that context, defendant does not accept 'primary' liability for payment of its insureds' medical expenses from auto accidents where no-fault insurance is available, but has instead carved out from its ordinary coverage a $300 limitation applicable to those situations.
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> "In this case, enforcement of defendant's 'other insurance' provisions which limit its liability to a de minimis amount would contravene the policies articulated in Federal Kemper by enabling the health insurer to circumvent primary liability, shifting it to the no-fault insurer through a reduction of otherwise available benefits. We decline to enforce this provision, and conclude that defendant health insurer is primarily liable for payment of the insureds' medical bills." Michigan Mutual, at 274-275.

We agree with this holding and conclude that defendant is liable for the insured's medical expenses to the extent its policy limits would have provided had the insured's injury not also been covered by no-fault insurance.

Reversed.

/s/ Gary R. McDonald
/s/ Michael J. Kelly
/s/ William F. Lavoy